No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NEW YORK CITY MUNICIPAL LABOR COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The issues presented raise significant concern to New York City's public-sector unions and their members. The New York City Municipal Labor Committee ("MLC") is an association of municipal labor organizations representing some 390,000 active workers dedicated to collectively addressing concerns common to its member unions and advocating on issues of labor relations relevant to City workers. The MLC was created pursuant to a Memorandum of Understanding dated March 31, 1966, signed by representatives of New York City and designated employee organizations and codified in Sections 12-303 and 12-313 of the Administrative Code of the City of New York. The workers represented by the MLC, comprising both uniformed and civilian employees, serve the public welfare, health and safety on a daily basis.

Each of the MLC member unions offers a "fair share" fee option for non-members to defray the cost of negotiating, administering and implementing the terms of its respective collective bargaining agreements, handling grievances and providing other union services. Each of these unions, as exclusive bargaining agent, is compelled under state law to bargain and otherwise act equally on behalf of the interests of all employees in its bargaining unit – members and non-members alike. The blanket

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. A consent letter on behalf of all parties is filed with this Court.

invalidation of "fair share" fees, contrary to Petitioner's unsupported assertions, would materially impair the MLC unions' abilities to represent New York City public-sector workers in negotiations for better terms of employment and would threaten the carefully balanced and well-established labor relations framework cultivated in the nearly five decades since the MLC was established, a history that includes nearly 40 uninterrupted years of reliance on the "agency fee" option.

SUMMARY OF ARGUMENT

For the second time in the Court's last four terms, a petitioner seeks to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). This persistent attempt to overrule the 40-year precedent reflects not a sudden "special justification" for overturning this entrenched precedent– as required for reversal under basic principles of *stare decisis*– but a fervent politically motivated desire, emboldened by the ideological winds of the moment, to drive a stake through the heart of public-sector unions. Petitioner here sheds the pretense of an incremental chipping away at the *Abood* precedent, in favor of a frontal assault on the role of public-sector unions altogether as the state-created mechanism for managing the relationship between public employers and the collective interests of public employees.

For decades, Americans "have debated the pros and cons of right-to-work laws and fair-share requirements." *Harris v. Quinn*, 134 S. Ct. 2618, 2658 (2014). Indeed, in recent years many states

have enacted right-to-work legislation based on their local needs and values. Today, 28 states have "right-to-work" laws. Yet, Petitioner now asks this Court to end that public discussion and impose a right-to-work regime for all public-sector employees in all states. The Court has thus far resisted the invitation to deprive every state and local government, in the management of their employees and programs, of an important tool, fair-share fees, that is necessary and appropriate to make collective bargaining work. The Court should continue to resist this invitation. Unions that give voice to public employees and the working middle-class in New York City and throughout the country depend on agency fees to effectively undertake their jobs within the labor relations structures chosen by each state to manage its public workforces.

Despite recent, persistent attempts to erode *Abood*, the precedent has repeatedly been affirmed. The Court has for decades determined that a union may, consistent with the First Amendment, require public-sector employees (like private sector ones) to pay their fair share of the cost the union (and its members) incurs in negotiating (and administering) collective bargaining agreements on their behalf for better terms of employment.

The importance of the doctrine of *stare decisis* operates at its summit in cases where a precedent has created strong reliance interests. There are few precedents in this Court's jurisprudence that have engendered as much reliance as *Abood*.

Nowhere are the reliance interests more pronounced than in New York City. New York

framed an important component of its labor-management relations structure in express reliance on *Abood*. Authorization to negotiate for agency fees was recommended by legislative and research committees in the turbulent early years of the Taylor Law (New York State's public-sector labor law), which saw considerable labor unrest in the late 1960's and early 1970's. Only after additional refinements to the law and ultimate inclusion of an agency fee provision – relying on the *Abood* decision – did matters stabilize.

The reliance continues today. As the Court recognized in *Harris*, "governments and unions have entered into thousands of contracts involving millions of employees in reliance on *Abood*." 134 S. Ct. at 2652. (Kagan, J. dissenting).

In New York City alone, 97 public-sector unions represent some 390,000 active City workers (and 120,000 retirees) working under 144 contracts that have fair share arrangements and rely upon these fees in funding collective bargaining and related non-political union activities. They have done so for decades.

The *Abood* precedent stood, in part, on the recognition of the necessity and complexity of a well-functioning public-sector labor relations system, and (like in the private sector) the integral role of the union as an exclusive bargaining representative to that system:

> The designation of a union as exclusive representatives carries with it great responsibilities. The tasks of

> negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required.

Abood, 431 U.S. at 221.

Public-sector unions in New York must serve all represented employees. Despite Petitioner's bare assertion that the costs of the responsibility pales in comparison to the "powers and benefits that come with exclusive representative authority," Pet. Br. 47, serving all employees costs significant time and money. It means hiring professional staff and investing in resources that provide representation and services to all bargaining unit members, not just union members. Indeed, since the *Abood* precedent, the increasing complexity of public-sector labor relations – negotiating healthcare benefits, navigating changing and increasingly complex legislation and practices relating to pensions, among other complicating developments, have made the task of representing the interests of employees exceedingly more difficult and costly.

The agency or "fair share" fee is justified, in large part, because New York, like many other states, compels its unions by statute to promote and protect the interests of its members *and non-*

members alike in negotiating and administering collective bargaining agreements. While the duty of fair representation allows a spectrum of reasonable conduct, that duty does not permit treating agency fee payers differently than members with regard to contract negotiation and administration. For MLC unions, a compulsory agency fee fairly distributes the cost of bargaining among those who benefit and counteracts the inescapable economic incentive that public-sector employees (like most rational individuals) would otherwise have to "free-ride" on the union's efforts for all. Petitioner's and *amici's* unsupported attempt to assume away the "free-rider" problem is belied by irrefutable principles of economics and human behavior, as well as our current national experience in "right-to-work" states. The simple truth is that someone must contribute to permit the union to perform its job and if all who benefit cannot be required to contribute, union members would be forced to carry the weight on their backs, subsidizing those who free-ride.

Rather than fairly treat the clear legitimate governmental interests, Petitioner focuses on the purported infringement of First Amendment rights that agency-fees impose, ascribing a nefarious "coercive" element to their payment. In reality, the fee is no more "coercive" than a taxpayer's obligation to pay taxes. Agency fees, like taxes, are not a "political" statement, but a means of ensuring that the collective bargaining system as a whole – which, itself, is composed of individually and democratically elected union representatives – functions properly. A citizen pays taxes to ensure the provision of government services; an agency fee payer pays fees

to ensure his union can properly operate. Just like any taxpayer who disagrees with government policies, even with this fair share fee, nothing precludes a public-sector employee in New York City, like any other citizen, from expressing his or her political viewpoint or engaging in political activities with regard to the union or more broadly in the local, state and federal political arenas. Nothing prevents an agency fee payer from seeking to influence union policies through organizing other agency fee payers and exerting political pressure or even seeking decertification. Indeed, a union would be prohibited from taking any retaliatory action against either a member or agency fee payer wishing to so act. The union's exclusive ability to speak is narrowly limited to direct negotiation with the employer on terms and conditions of employment. It has no authority to silence its detractors internally or externally. The union and the individual member are free to lobby the legislature as any other citizen. Moreover, unlike private organizations, unions are obliged to have internal democratic processes. Thus, any First Amendment infringement, if such infringement exists at all, is minimal.

Ultimately, Petitioner not only betrays fidelity to this Court's decisions, which have long recognized the importance of public-sector unions in fostering peaceful labor-management relations, he threatens to significantly undermine unions' efforts within New York City's legislatively created collective bargaining system to protect middle class workers.

This case presents wide-ranging implications for the future of labor relations, union funding and collective bargaining. Petitioner's stance would

summarily and instantaneously eliminate the 40-year old distinction between union fees utilized for collective bargaining, contract administration and grievance adjustment, and those used for political or ideological activities established in *Abood* and refined in later cases.

Yet, even more broadly, Petitioner threatens to upend First Amendment jurisprudence in the public-sector altogether. Case law draws a clear distinction between political speech and speech on traditional employment-related matters in the context of public employment. *E.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

If, as Petitioner argues, all speech related to a union's collective bargaining negotiation – quintessentially "terms and conditions" of employment – is deemed "lobbying" because such negotiations may ultimately impact the public fisc, virtually all speech would enjoy full constitutional protection in the public workplace. If there "is no distinction between bargaining with the government and lobbying the government," as Petitioner asserts Pet. Br. 10, any workplace complaint or demand would be considered political speech. The types of individual employee grievances, which under well-worn Supreme Court precedent lack First Amendment protection, would take on a constitutional dimension. There is simply no principled distinction in the Constitutional analysis between the content of one voice seeking to speak on employment-related matters, and the collective voices of a union seeking to speak on precisely the same subjects.

The point, contrary to Petitioner's view, is not whether the *Pickering* test applies neatly in the agency fee context; it is that accepting Petitioner's view regarding what constitutes political speech or "lobbying" as those terms have been understood in this Court's First Amendment parlance, would obliterate the carefully drawn distinction between the government as employer and as sovereign. Petitioner's position endangers not just ongoing labor-management relations in New York City and elsewhere, but the continuing coherence of First Amendment jurisprudence in the government employer context as well.

One final point merits brief mention. Petitioner and *amici* make much of the purported practical difficulty in administering the distinction, first articulated in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), between chargeable activities – *i.e.*, those germane to collective-bargaining, contract administration and grievance procedures – and non-chargeable political activities. As in Illinois, New York City's unions calculate the fair-share fee on the basis of detailed accounting that identifies a union's expenditures and excludes all expenses not chargeable. That accounting is audited by an independent certified public accountant, and then reported to represented employees in a "*Hudson*" notice, and employees are entitled to bring a challenge to the amount in arbitration. A new *Hudson* notice with updated calculations is prepared each year. The procedure has been seamlessly ingrained in the dues collection process for years. The notion that the *Abood* precedent is too difficult to administer is a red herring, one proven immaterial

by New York City's experience. There has been no showing here that *Abood* cannot be administered in Illinois, let alone the entire nation.

Even if the line drawn between permissible assessments for collective bargaining activities and prohibited assessments for ideological activities appears "somewhat hazier" in the public-sector, *Lehnert*, 500 U.S. at 521, in the vast majority of instances chargeable activities may be readily distinguished from non-chargeable ones. The many day-to-day services our unions regularly provide are not only apolitical, but often mundane and ministerial, though no less critical for our members. In any event, the *Lehnert* and *Abood* required determination of what constitutes political versus non-political expenditure is precisely the type of jurisprudential test that arbitrators and courts are routinely called upon to decide.

ARGUMENT

Consistent with the Railway Labor Act cases before it and, indeed, constitutional jurisprudence more generally, the *Abood* Court approached the issue from the perspective of whether public employee unions should have a right analogous to that of private sector unions and framed its analysis as balancing (1) the legitimate interests of government in securing labor peace and avoiding the free-rider problem with (2) the First Amendment free speech rights of individuals.

Here, Petitioner has attempted to rig the scale unfairly with a foisted strict scrutiny analysis and conclusory political rhetoric in the absence of actual

material record facts. Self-serving declarations that exclusive representation alone is sufficient to carry out the responsibilities of a public-sector union within a state's chosen construct for engaging its employees or that a union's obligation to treat members and non-members alike would be unaffected by the wholesale elimination of agency fees, provide an insufficient basis on which to eliminate agency fees across the country.

I. STRONG GOVERNMENT INTERESTS JUSTIFY AGENCY FEES

A. Whether To Permit Agency Fees Constitutes A State Policy Choice

Public-sector bargaining regimes are creations of state law and reflect a state's considered judgment about how to organize and manage its public employee workforce. The National Labor Relations Act leaves regulation of state and local government labor relations to the states. *See* 29 U.S.C. § 152(2).

The Court in *Abood* correctly determined that any arguable interference caused by agency fees "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations." 431 U.S. at 222. While not "judg[ing] the wisdom" of the decision, the Court recognized it was for Michigan to determine whether labor stability would be best served by a system of exclusive representation and the permissive use of an agency shop fee for public-sector unions. *Id.* at 229; *see also Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 234 (1956) (the "ingredients of industrial peace and stabilized

labor-management relations are numerous and complex" and the decision of whether the "union shop [is] a stabilizing force...rests with the policy makers, not with the judiciary").

In New York, too, agency fees are allowed by statute to be part of public-sector collective bargaining agreements. The legislation authorizing these arrangements specifically relied on *Abood*. N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*). The carefully calibrated inclusion of agency fees in New York's labor relations structure should not be dismissed. While strikes and other work disruptions by public-sector employees are now exceedingly rare, they were common when New York (and many other states) first adopted and refined public-sector labor relations laws. *See* Donovan,, Administering the Taylor Law (ILR Press 1990); *see also* N.Y. Governor's Committee on Public Employee Relations, *Final Report* (1966) (there is "widespread realization that protection of the public from strikes in...public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment"); *Ass'n of Surrogates & Sup. Ct. Reporters v. States*, 78 N.Y.2d 143, 152-53 (1991) (in approving the Taylor Law the Governor noted the need for the legislation had been "unquestionably demonstrated over the years...to resolve paralyzing strikes and threats of strikes by public employees").

Labor unrest continued in the early years of the Taylor Law as government employers and unions adjusted to their new roles and the law was refined, first in 1969 (adding unfair labor practices and

additional strike deterrents) and again in 1977 (authorizing agency fees). Donavan, *supra*, at 104-31. New York City, operating under a state-permitted local analogue to the Taylor Law, suffered some of the most crippling continuing labor strife. *Id.* at 204. Indeed, in 1969, as part of a response to legislative inquiry regarding public-sector labor relations in New York City, Mayor Lindsay urged authorization of agency fee arrangements. *Id.* at 126. The State Public Employment Relations Board agreed and sought to have the authorization extended state-wide. *Id.* These views coalesced with the recommendations of two other study committees in 1969 and again in 1973. *Id.* at 193. Ultimately, shortly after *Abood*, New York amended the Taylor Law (with New York City following suit) to permit agency fees. *Id.*

The designation of a single bargaining representative, coupled with the agency fee, helped to stabilize labor-management relations and avoid the confusion that would result from attempting to enforce multiple agreements specifying different terms and conditions of employment. *Abood*, 431 U.S. at 221 (explaining the benefits of eliminating this confusion). These changes helped ensure the uninterrupted provision of governmental services. *See* N.Y. Civ. Serv. L. § 200. And they gave public-sector workers a greater voice in determining the terms of their employment, which, too, acted to minimize labor strife. *See* N.Y. Governor's Comm. On Public Emp. Relations, *Final Report* at 42, 54 (1966) (inability of public employees to unionize and have "a greater voice" in determining the terms of their employment contributed to the use of strikes).

The basic system has remained undisturbed for decades and New York has relied upon agency fees ever since.

Petitioner now wishes to disrupt New York's (and other states') chosen system of managing labor relations. Petitioner and his political allies wish to avoid paying a single cent for collective bargaining from which all represented employees gain substantial benefit because of unspecified objections to the positions taken by teachers' unions in Illinois or unionization broadly. They are certainly entitled to have that opinion, but they should not be permitted to force that view on all state governments.

Illinois and New York, like many other states, have decided to manage their public-sector workforce by allowing workers to select, on a majority basis, a union as their collective bargaining representative. *See* N.Y. Civ. Serv. L. § 204; *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). The selected union, by statute, receives the exclusive right to negotiate terms and conditions of employment for the covered employees and becomes required to represent all members of the bargaining unit fairly. *See e.g.*, N.Y. Civ. Serv. L. § 208(3)(a); 5 I.L.C.S. 315/6(d). In turn, unit members who choose to not become union members must pay a service fee that is relevant only to the nonpolitical aspects of union representation. Illinois and New York have determined through their policies that the exclusive representation model best promotes sound workforce management and productivity. The "fair share" fee acts as a crucial component of that model.

Imagine New York City negotiating with the approximately 390,000 public employees separately with regard to terms and conditions of employment or, worse yet, unilaterally imposing terms and reaping the unrest of pre-*Abood* times. Such approach would be (and has been historically) untenable. New York State, among others, opted for a different approach, harmonizing the rights of public-sector workers with the needs of government employers and the public welfare. The services a union provides and the role it plays benefit not only the workers but extend to the labor-management framework as a whole.

Petitioner's objections to that framework are largely premised upon personal and political beliefs that unions are an ill rather than a good. *See* Pet. Br. 50 (asserting unionization, at its core, is improper "collectivization for a political purpose" in violation of the First Amendment). While Petitioner may believe that, government works by the majority setting policies applicable to all, not just those who favor them. Here, state government has determined that organizing public employees into unions within the structures of a labor law is beneficial to all. Petitioner has the same rights with regard to this policy as any other: he may voice his objection, he may vote his state government out of office in favor of those who support a right-to-work agenda, but he may not decline to pay the small service fee that is a part of the state's labor policy.

The distorting effect of these anti-union views on the legal analysis is amplified by Petitioner's (perhaps purposeful) conflation of the state as a sovereign, entitled to make policy choices as to how

public employers and public employees are to interact for the good of the state, and the specific bargaining interests of any particular public employer at the bargaining table. *See* Pet Br. 7 (discussing what Petitioner views as reasonable and beneficial bargaining demands proposed by Illinois and AFSCME Council 31's resistance to those bargaining demands).[2]

Petitioner is correct to caution that the Court not confuse the interests of "partisan organizations with government interests," Pet. Br. 36, but it is Petitioner that makes this mistake by substituting the union's interests for those of the state. It is equally as important to not confuse a state's interest in its labor relations policy with the specific bargaining position or interests of any one public employer at the bargaining table. The merits or lack thereof of any bargaining position have no bearing on the question presented here: whether a state's choice of "recipe" for labor peace within its borders can lawfully include authorizing agency fees. Petitioner uses this improper focus on the bargaining interests

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[2] Though purposefully avoided by Petitioner, the root of Governor Rauner's purported bargaining dilemma is not *Abood*. Illinois has chosen a system of labor relations and its Governor, like other public employers in the state, must work within that system. Nothing in *Abood* (or any other case) prohibits Illinois from solving its own "problems," as Petitioner sees them, by adopting right-to-work legislation. The issue in Illinois is not that any Supreme Court precedent has abrogated Petitioner's rights; it is that a sufficient number of Illinois residents do not agree with Petitioner's political views to enact right-to-work legislation. As a result, Petitioner seeks is to have the Supreme Court perform an end-run around Illinois' and every other state legislature under the pretense of protecting public employees.

of individual public employers to the exclusion of the larger interest of the state to artificially narrow the Court's focus when weighing interests.

While it is Petitioner's view that government employers would have greater flexibility to operate when not bound by the strictures of union contracts, free from the obligation to bargain collectively and able to set terms and conditions unilaterally, Pet Br. 54-55, those value judgments cannot limit the ability of states to set priorities and adopt policies.

Petitioner asserts that there can be no state interest in bargaining with a union and certainly no interest in bargaining with a strong and competent union, even concluding that "no rational actor wants to deal with a powerful negotiating opponent." Pet. Br. 60-61. This observation, however, conflates the adversarial self-interest of a public employer at the bargaining table with the state's interest as a sovereign in creating a system with checks and balances by which employees are given a voice in setting their own terms and conditions of employment. In New York and elsewhere, these policy choices are informed by a history of labor strife, strikes and service interruptions resulting from the type of top-down imposition of terms of employment Petitioner praises.

Petitioner's approach to labor policy is summed up by his suggestion that public employers "can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate." Pet. Br. 55-56 (internal quotations and citations omitted). According to Petitioner, "government employers can

deal with any workplace issues simply by enforcing employee codes of conduct." *Id.* By this logic, we could eliminate defense attorneys and courts, allowing prosecutors to unilaterally enforce the law.

Petitioner finds it "absurd" for states to feel compelled to protect their operations from the very public officials that manage them. Pet. Br. 55. However, many aspects of our democratic society functions through similar systems of adversarial contest and checks and balances.

Far from absurd, many state governments have made judgements finding that the sometimes adversarial and sometimes collaborative process of bargaining with two equal participants is most likely to result in terms and conditions of employment that balance both the interest of government as an employer and the interests of employees without risk of interrupting services to the public. The process also recognizes that hundreds of thousands of public employees (in New York City alone) are not merely resources for the government to use up in its provision of services, they are also its citizens.

Petitioner pays lip service to the ability of government to "control" its employment terms, Pet. Br. 58, except that he demands that all governments all over the country exclude from such terms a strong union-based labor relations policy in favor of Petitioner's desired unilateral policy. States like New York "control" the terms and conditions of their public employees by establishing a legal framework for the setting of such terms and conditions. It is this fundamental interest of the state to set its own labor policy which is to be balanced against the

minimal intrusion of requiring a service fee be paid within that statutory structure.

Of course, New York's and Illinois' system of collective bargaining is not universal. Certain states have adopted similar but variant systems for conducting labor relations. Kearney & Mareschal, Labor Relations in the Public Sector 30–32 (5th ed. 2014) (there is "one set of [labor] laws for federal workers and 50 sets for the states..."). Others do not require collective bargaining or authorize agency fees at all. States like Wisconsin and Michigan are free to enact "right-to-work" legislation (though both states permit agency fees for certain public safety employees). *Abood* does not issue a command; rather, it provides a choice, leaving to states the right to devise their own systems in light of their history. Voters in each state ultimately have the final say over changes or amendments to labor policy. *Abood*, 431 U.S. at 224. In New York, the voters have decided and their conclusion on the proper system of labor relations for their public-sector workforce should not be judicially invalidated. *See Hanson*, 351 U.S. at 233-34 (because "[w]hat would be needful one decade might be anathema the next," the decision whether to incorporate a closed shop in labor relations "rests with the policy makers, not with the judiciary").

Moreover, union activity and subjects of bargaining vary greatly among situations and among states. Disciplinary procedures, for instance, are generally mandatory or permissible subjects of bargaining in some states (New York for one) and not in others. New Mexico, for example, which otherwise permits public-sector collective bargaining and

agency fee arrangements, sets disciplinary procedures by state agency rule, not collective bargaining. *See* N.M. Stat. Ann. § 10-9-13 (West) (requiring the state Personnel Office to promulgate rules for dismissal and demotion procedures for public employees). The wisdom of the inclusions and exclusions is not the issue; rather, the point is that these myriad formulations underscore the vast differences among jurisdictions in tailoring labor relation systems to suit their local needs.

B. The Exclusive Representation Designation Requires Agency Fees

In the *Lenhert* decision, Justice Scalia recognized that the state interest that justifies agency fees arises from a union's statutory duties. Where "the state imposes upon the union a duty to delivery services, it may permit the union to demand reimbursement for them; or looked at from the other end, when the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Lenhert,* 500 U.S. at 557.

In New York, like many other states, the Taylor Law explicitly provides for a compulsory duty of fair representation. N.Y. Civ. Serv. L. 209-a(2)(c). All unions are required to treat all unit members equally with respect to the terms and conditions of employment. *Leahey v. Patrolmen's Benevolent Ass'n*, 47 OCB 22 (BCB 1991) (union breaches its duty of fair representation "if it fails to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements"). Thus, contrary to Petitioner's assertion, while "unions have wide latitude to agree

to contract terms that favor some employees and disadvantage others," Pet. Br. 45, such distinction generally cannot be based upon membership.

Petitioner summarily insists that agency-fees are unnecessary for public-sector unions, because state-conferred exclusivity is "extraordinarily valuable." Pet. Br. 38. Though no quantifiable dollar value is (or can be) ascribed to the so-called "valuable powers," Petitioner dismisses one of the long-held justifications for requiring agency-fees and assumes that in the absence of the requirement, the "privilege of exclusive representation," Pet. Br. 44, in itself, will pay for the costs of representing, in the case of New York City unions, hundreds of thousands of public-sector employees.

Exclusive representation does not pay a union's bills. To give the Court a sense of the costs involved, just one of the City's large unions budgets some $2.5 million annually for its legal department, supporting bargaining, arbitrations, and statutory hearings. The costs for all unions would be millions of dollars more. The "valuable powers" conferred by exclusive representation, without fair funding by agency-fees, are wholly insufficient to shoulder this burden.

At the same time Petitioner seeks to ascribe a monetary value to exclusivity, Petitioner also attempts to downplay the true financial burden a union bears, stating that "any additional cost of representing nonmembers in addition to member is minor." Pet. Br. 45. As an example, Petitioner dismisses the burden of representing nonmembers in grievances as "hypocritical," because unions

contractually require that a union and not individual employees can pursue a grievance. Pet. Br. 46.

The argument may have political or aesthetic appeal to Petitioner and others of a similar viewpoint, but it subverts reality and fails to address the legal issue. A union is not an interloping entity distinct from the public employees it represents. It is its members. Thus, while some union expenses may not materially change in the absolute sense – for example, the cost of negotiating wage increases for 100 unit members rather than 80 members – that cost is borne by a smaller number of individuals, forcing union members to subsidize benefits for Petitioner and other former agency fee payers. This economic reality results in union members receiving a wage increase that, net of contributions, is actually lower than that of nonmembers who, under Petitioner's desired construct, receive it without making any contribution at all. This burdens union members and, thus, unions. Basic economics precepts dictate that this would be an unsustainable system.

Similarly, the cost of other areas of union representation directly increases in relation to the number of represented employees that utilize them. Many MLC unions integrate disciplinary charges into their contractual grievance process; consequently, union processing of grievances necessarily includes the defense of disciplinary charges. Other MLC unions employ outside counsel to provide such services to employees as well as negotiate for and administer informal workplace procedures for minor infractions. Yet other MLC unions provide a team of attorneys through their

affiliation with a state labor organization for the defense of disciplinary charges. And all of these services, and far more discussed *infra* at Point II.B., are available to and utilized by agency fee payers, and cost substantial sums of money.

C. States Have A Legitimate Interest In Avoiding The Free-Rider Problem

This Court has continuously recognized a primary purpose of the agency shop fee is to counteract free-riding. *See Abood,* 431 U.S. at 222; *Lehnert,* 500 U.S. at 537-38; *see also, Ellis v. Bhd of Ry., Airline & S.S. Clerks,* 488 U.S. 435, 452 (1984) (allowing free-riding corrodes workplace harmony and cooperation by "stirring up resentment" because some employees can "enjoy[] benefits earned through the other employees' time and money").

The rationale for the Court's repeated acceptance is self-evident: a rational economic individual would seek to enjoy the collective benefits a union provides without paying dues if he or she can avoid them.[3] If agency fees are rendered unenforceable for public-sector employees, unassailable tenets of economics compel the conclusion that union membership would dramatically decline. *Harris,* 134 S. Ct. 2656 (Kagan, J. dissenting) (recognizing the duty of fair representation "creates a collective action problem of

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[3] *See* Olson, Mancur, "The Logic of Collective Action: Public Goods and the Theory of Groups." Cambridge, MA: Harvard University Press (1965); *see also* David, Joe C. and John H. Huston, "Right-to-Work Laws and Free Riding," 31 Econ. Inquiry 52 passim (1993) (finding the free-rider problem higher in right-to-work states).

far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers"). The resulting decline in membership would weaken unions, place pressure on a union's ability to comply with the duty of fair representation, sow divisiveness, undermine the effectiveness of the collective bargaining process and likely push employee compensation below market levels. *See* Cooper, David and Lawrence Mishel, "The Erosion of Collective Bargaining Has Widened the Gap Between Productivity And Pay," *Economic Policy Institute Briefing Paper*, Jan. 6, 2015 (linking the widening income and wage disparity to the erosion of collective bargaining rights).

Statistics and studies in the field prove the point. Right-to-work legislation significantly increases the level of free riding in public-sector unions. In "right-to-work" states during the years 2000 to 2013, free-riders represented 20.3% of public employee bargaining units. *See* Keefe, J., "On *Friedrichs v. California Teachers Association*," *Economic Policy Institute Briefing Paper #411*, Nov. 2, 2015 ("Keefe 2015"). Public-sector union density[4] in those areas registered at 17.4%. *Id.* By contrast, in states allowing agency shop agreements, only 6.8% of those in bargaining units chose not to join the union, with union density at a far more robust 49.6%. *Id.* Other data suggests that free-riders may actually represent as much as 35-40% of employees covered by a collective bargaining agreement when agency

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[4] Union "density" reflects the percentage of public sector employees represented by a union.

fees are banned. *Id.* Thus, right-to-work laws significantly reduce the likelihood of union representation of public-sector employees as a whole. *Id.*[5]

More recent studies have similar results. From 2015-2016, for example, union membership in right-to-work states fell by over 293,000 members. Union membership declined in 20 of the 26 states with right-to-work laws. Conversely, in fair-share collective bargaining states, overall union membership increased by over 56,000 members and declined in only 9 of the 25 agency fee states (including the District of Columbia).[6]

These empirical trends are beyond dispute. To buttress his contention that the "free rider" effect is minimal in right-to-work states, Petitioner footnotes a statistic from 2008 reflecting the percentage of union membership in right-to-work states with exclusive representation versus right-to-work states that ban exclusive representation. Pet. Br. 41, fn. 20. According to Petitioner, in Nevada, Iowa, Florida and Nebraska union membership rates were 37.9%, 31.6%, 27.9%, and 27.2%, respectively, while in Georgia, Virginia, Mississippi, North Carolina and

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[5] *Citing* Hundley, Greg, "Who Joins Unions in the Public Sector? The Effects of Individual Characteristics and the Law," *Journal of Labor Research* 9, 301-23 (1988) and Moore, William, "The Determinant and Effects of Right-To-Work Laws: A Review of the Recent Literature," *Journal of Labor Research*, vol. XIX, no. 3 (1998).

[6] Manzo IV, Frank, "Union Membership Declined in 'Right-to-Work' States and Increased in Collective-Bargaining States Last Year," Illinois Economic Policy Institute, May 10, 2017.

South Carolina, states that ban exclusive representation, the percentages were 4.2%, 5.2%, 6.0% and 8.2% respectively.

The statistics do not support overruling *Abood*. These states account for but 10% of public employees and 6% of all public-sector employee union members in the United States. Further, they show that exclusivity is an important factor in a successful union-based labor policy, not the only important factor.

Conveniently omitted from the footnoted analysis are the membership percentages for states that have exclusive representation ***and*** agency fees. Those percentages and their comparison to exclusive representation/non-agency fee states reveal the true impact of agency fees on union membership – and the differences are stark. In states such as New York, New Jersey, Rhode Island and Massachusetts where agency shop fees are built in to an exclusive representation framework, public-sector union membership hovers around 70.2%, 58.4%, 63.8% and 54.2% – generally double that of states with exclusivity that ban agency fees.[7]

In a post-*Abood* environment, those percentages would inevitably tumble. The recent case study of Wisconsin's right-to-work legislation illustrates the likely consequences of prohibiting agency-fees. Wisconsin's Act 10, passed in 2011, contained a right to work provision among other

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[7] *See "Union Membership and Coverage Database from the CPS," available at* http://www.unionstats.com/ last visited January 18, 2018.

restrictions on collective bargaining. (Keefe 2015, at 10). Once implemented, union membership in Wisconsin's largest teachers' union immediately declined by 29%. By early 2014, that union had lost a third of its members and by February 2015, it had lost more than half. *Id.* The AFSCME union in Wisconsin reported a similar experience, suffering a 70% decline in membership since Act 10 was enacted. (Keefe 2015, at 10).[8] Today, total union membership in Wisconsin hovers at 9%.

Amici submissions tell a similar story regarding Michigan's 2012 right-to-work legislation. As *amicus* explains, since 2012, the Michigan Education Association's membership has decreased by 25% (some 29,637 members). The union's dues income has declined from $61,895,814 to $47,982,763 – a decrease of $13,913,015." Mackinac Ctr. Br. 37.

Petitioner takes great pains to try to explain away the free-rider problem and to hypothetically justify why exclusive representation alone suffices to "assist unions with recruiting and retaining members." Pet. Br. 40. The empirical evidence and the recent experience of right-to-work states demonstrates otherwise. Overruling *Abood* would undeniably imperil collective bargaining nationwide.

Two final points merit brief mention. First, aside from the dubious statistical data, Petitioner dismisses the free-rider problem, at least in part, because unions *voluntarily* seek to be exclusive representatives. The argument is neither compelling

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[8] *Citing* Samuels, Robert, "Walker's Anti-Union Law Has Labor Reeling In Wisconsin," *Washington Post*, February 22 (2015).

nor correct. The notion that a union is "seldom required" by law to engage in activities that benefit nonmembers, Pet. Br. 47, is flatly untrue, at least in New York, where the Taylor Law explicitly provides for a compulsory duty of fair representation. N.Y. Civ. Serv. L. 209-a(2)(c). Further, to the extent Petitioner meant to assert that unions decide to organize knowing this duty exists, the same can be said of Petitioner. True, states do not compel unions to become exclusive representatives (Pet. Br. 44), but they also do not compel Petitioner to seek public employment in a state which chooses to manage its public employees using a union-based model, including compulsory agency fees. *See McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (Holmes, J.) (a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

Second, and relatedly, the elimination of agency fees would create a perverse incentive for unions to offer certain union services and benefits only to members. While the core of unionization is unity, where free riding threatens the viability of a union, a union could be compelled to find ways to attract dues-paying members. In states where such "members only" benefits are prohibited, unions would be severely hamstrung in their ability to perform their statutory function by the absence of agency fees. It would not only reduce union funding, but it would force unions to shift resources towards basic fee collection and away from core union duties. Stated differently, allowing free-riding places a significant economic strain on a union's ability to effectively carry out its long-established and often

mandatory duty of fair representation for all bargaining unit members.

II. THERE IS A CLEAR DISTINCTION BETWEEN BARGAINING WITH GOVENRMENT ON EMPLOYMENT MATTERS AND LOBBYING GOVERNMENT

A. Banning Agency Fees Would Create Significant Contradiction in First Amendment Jurisprudence

Likely in recognition of the substantial governmental interests outlined above, Petitioner attempts to place great weight on the purported infringement of his First Amendment rights, arguing all speech directed at government which seeks to influence policy to benefit the speaker (here, the union) is lobbying, and, thus, political speech. But this simplistic view of the complexities of public employment stands in stark contrast to well-settled nuanced case law in both the First Amendment and other contexts.

The longstanding test for whether speech of a public employee is protected First Amendment speech is whether the speech is a matter of "public concern" or whether the speech is made "pursuant to" the employees' official duties. *Garcetti*, 547 U.S. at 421. The rationale for this content-focused approach is that while the public-sector employee does not shed his or her constitutional protections when accepting public positions, the government may properly regulate employment-related speech necessary for efficient and effective operation as an

employer. *Garcetti*, 547 U.S. at 418.[9] A "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large," *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 600 (2008), and a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011) (Kennedy, J.,) (quoting *Garcetti*, 547 U.S. at 418).

Speech made about and pursuant to one's official duty as a public employee is not constitutionally protected. A police officer's

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[9] The distinction between the government acting as employer as opposed to sovereign is not limited to the First Amendment context. A crucial difference exists with respect to constitutional analysis, "between the government exercising "the power to regulate or license as a lawmaker," and acting "as proprietor, to manage [its] internal operations." *Engquist*, 553 U.S. at 598 (internal citation omitted).

This Court has long held, for instance, that in certain circumstances public sector employees may have their property searched at the workplace without a warrant supported by probable cause despite the Fourth Amendment guarantee against unwarranted governmental searches and seizures (*O'Connor v. Ortega*, 480 U.S. 709, 721-22 (1987)); they may not petition the government under the Petition Clause of the First Amendment on private employment matters (*Guarnieri*, 131 S. Ct. at 2501); and they may not invoke the Equal Protection Clause "class-of-one" theory to challenge employment personnel decisions (*Oregon*, 553 U.S. at 598). Each of these precedents recognizes that when the government acts within the employment relationship, a modest infringement of constitutional rights gives way to more practical realities of a functioning governmental workplace. This case is no different.

complaints about planned department reassignments,[10] for example; a teacher's complaint about her workload,[11] or general speech about employment conditions[12] are the types of routine workplace matters that do not constitute protectable First Amendment speech.

Yet, under Petitioner's view, the collective voice of a union, rather than an individual employee speaking on the very same matters – departmental reassignments, workload and employment conditions– constitutes protected political speech. The idea that these commonplace employment-related matters are suddenly transformed into political ones because they are asserted by a union, rather than a single employee, is unprincipled, finds no support in First Amendment case law and threatens to upend decades of this Court's precedent.

Typically, the determination of whether the coerced or prohibited speech at issue implicates the government acting as employer or as sovereign requires consideration of the actual speech and the context of that speech. Courts primarily look to whether the speech relates to "a matter of public concern." *Garcetti,* 547 U.S. at 418. If not, the employee has "no First Amendment cause of action." *Id.* If the speech addresses a matter of public concern, contrary to Petitioner's implication, the analysis does not stop there. The court then

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[10] *Mills v. City of Evansville,* 452 F.3d 646 (7th Cir. 2006);

[11] *Fox v. Traverse City Area Pub. Sch. Bd. Of Educ.,* 605 F.3d 345, 347 (6th Cir. 2010);

[12] *Brooks v. Arthur,* 685 F.3d 367, 372 (4th Cir. 2012).

determines whether the government had adequate justification for its action by balancing the interests of the employee, "as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

Even if arising from separate precedential antecedents, *Abood's* distinction between non-ideological and ideological speech functions as an overlay on *Pickering's* distinction between speech in the government workplace of "public concern" and "speech of its employees." *Pickering*, 391 U.S. at 568. Though the *Abood* Court did not extensively cite the *Pickering* balancing test, it surely understood this distinction between the government as an employer and as sovereign. The *Abood* Court correctly recognized that the "uniqueness of employment is not in the employees nor in the work performance; the uniqueness is in the special character of the employer," the government which has a separate and independent constitutional obligation to its citizens. 431 U.S. at 227. Thus, the Court recognized the distinct duties of the government both to its employees and to citizens broadly.

The *Abood* Court drew a line between, on the one hand, lobbying and political activities directed at the government as sovereign, and on the other, collective bargaining or negotiating terms of employment, directed at the employer (which here happens to be the government). The union's exclusive representation of a workforce, inextricably intertwined with the right to collect agency fees, is limited to the bargaining table. Such exclusivity

does not extend to street corners, voting booths or the steps of City Hall, where agency fee payers and union members alike may agree or disagree with particular positions taken by the union or government, including the adoption or repeal of right-to-work laws.

Petitioner suggests that his objection to paying fair share fees is political or reflects a matter of "public concern" because government spending *writ large* raises issues of public import. But Petitioner is applying the *Pickering* framework to the wrong speech. To attempt to invalidate agency fees, Petitioner claims that it is the union's speech on issues pertaining to pay and working conditions that is protected politicai lobbying such that Petitioner should not be required to support it. The claim is tied directly to the distinction drawn by *Abood* and its progeny between union speech related to collective bargaining and political lobbying. The *Pickering* framework(like *Abood*), however, treats such speech about the adequacy of pay, hours of operation, the disrepair of facilities as generally constituting employee grievances and not protected speech on a matter of public concern. The only difference between an individual employee complaining about inadequate compensation (speech that, under *Pickering*, would *not* be protected speech) and a union seeking wage increases is the number of voices represented in the demand, not the nature of the speech.

For over 50 years, the Court has not only recognized but repeatedly emphasized this important, nuanced distinction between a union's political expenditures, *i.e.*, those of a "public

concern," and "those germane to collective bargaining" with only the latter properly chargeable to non-union members. *E.g., Lehnert*, 500 U.S. at 515. An employee's free speech rights "are not unconstitutionally burdened because the employee opposes a position taken by the union in its capacity as collective bargaining representative." *Id.* at 517. Basic speech by a union concerning quintessential employment matters – wages, benefits, discipline, promotions, leave, vacations and termination – do not necessarily transform into constitutionally protected First Amendment speech as addressed by a union simply because such decisions may in some, unspecified manner impact the public. *Harris*, 134 S. Ct. at 671 (Kagan, J., dissenting) ("we have made clear that except in narrow circumstances we will not allow an employee to make a federal constitutional issue out of basic employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations") (internal citation omitted).

B. *Abood* Is "workable" As New York City's Public-Sector Unions Provide Services (Funded By Agency Fees) That Are Undeniably Non-Political And Non-Ideological

The notion that *Abood* is "unworkable" is a convenient and academic argument asserted under the guise of practicality. In reality, *Abood* is eminently workable. And even if Petitioner could establish that the existing test for identifying chargeable expenses was somehow inadequate, the appropriate solution would be to refine the test, not

to jettison it altogether and risk dismantling public sector labor relations in multiple states.

The bulk of the often voluminous collective bargaining agreements that our member unions sign with New York City and other City-affiliated public employers concern employment matters far beyond anything that could fairly be considered lobbying or of "public concern." Just because unions at times align themselves with a "wide range of social, political, and ideological viewpoints" and causes, *Lehnert,* 500 U.S. at 587-88, does not mean they always, or even often, so align.

In the vast majority of instances chargeable activities may be readily distinguished from non-chargeable ones. Quite apart from lobbying and other ideological activities that occupy newspaper headlines, New York City municipal unions perform valuable administrative and other services. For example, many MLC unions provide personal pension consultation services (for members and agency fee payers alike). These consultations create no increase in pension costs or influence any governmental expenditure or budgetary item. The only cost associated with the consultation is borne by the union in providing trained consultants, facilities and materials.

There are elsewhere myriad examples of such chargeable services being regularly provided by MLC member unions that are valuable to members and agency fee payers alike, costly for the union to offer and, even by Petitioner's own measure of lobbying (*i.e.,* attempting to influence policy) not political in

nature.[13] MLC unions, for example, provide group legal services for a variety of members' personal matters, including house closings, will preparation, and matrimonial disputes, without regard to whether the member pays dues or an agency fee.

Moreover, workplace health and safety represent additional important chargeable areas for many New York City workforces. Unions provide safety education and represent workers in situations where their safety may be compromised. In fact, several New York City unions have industrial hygienists on staff (at no small cost), to address workplace health and safety issues – from contact with hazardous materials, to procedures for handling contagious diseases, to investigations that reveal whether a school or other public facility is located on a toxic site or contains asbestos. The benefits of these services inure to members, agency fee payers and, often, the public as well. Not having students and staff breathing in asbestos in a school undergoing construction, ensuring that female employees have sanitary facilities for clean-up, or that all employees have appropriate places for donning and doffing gear reflect typical workplace issues, not the manifestation of a political agenda.

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[13] Petitioner specifically relies on a comment made in *Harris* that a union's position on spending may have a "massive" effect on government spending. Pet. Br. 14. That assertion neither legally determines the issue nor is its implication that unions cause government to substantially increase spending true. Citations to the total cost of providing a public service do not speak to the impact of union speech, but to the scale of the service provided. In any event, studies have found that overall budgetary expenditures do not materially shift as a result of collective bargaining. (Keefe 2015, at 11).

Similarly, while Petitioner fixates on a union's role in negotiating wage increases, that task occurs only periodically upon the expiration of a prior agreement. Even in the realm of compensation, a union spends the vast majority of its day-to-day work administering the agreement, including helping workers understand pay structures, evaluate possible payroll errors and navigate the payroll correction processes. Viewed honestly, these activities cannot be characterized as remotely political in nature or lobbying, yet are immensely important to an individual public-sector employee.

These types of services, combined with matters of health and safety, handling grievances, and providing legal services, comprise the bulk of the work of our unions, which are funded by dues and agency fees.

Finally, public-sector unions in New York City, like many around the country, understand the distinction drawn in *Abood* and its progeny between chargeable and non-chargeable activities, and have implemented workable administrative pay structures consistent with its teachings. As the *Abood* Court recognized, while there may be occasional "problems in drawing lines between collective bargaining...and ideological activities," 431 U.S. at 236, they are few and far between – certainly not occurring with sufficient frequency to issue a blanket invalidation of fair share fees altogether.

This Court should be under no illusion: the Petitioner and his *amici* supporters, in drawing their hypothetical lines without any record to support it, mischaracterize the true realities of operating a union and managing a city's large public-sector

workforce. Theoretical classification issues are not a reason to disrupt such an important and well-established precedent, particularly one that the public-sector unions of New York have relied upon for decades.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and this Court should decline to overrule *Abood*.

Respectfully submitted,

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